26 April 2024

Retirement, Advice and Investment Division
Treasury
Langton Cres
Parkes ACT 2600

Email: superannuation@treasury.gov.au

Dear Sir/Madam,

SMSF ASSOCIATION SUBMISSION – TREASURY LAWS AMENDMENT INSTRUMENT 2024: BETTER TARGETED SUPERANNUATION CONCESSIONS

The SMSF Association welcomes the opportunity to provide this submission in response to the exposure draft regulations for the *Better Targeted Superannuation Concessions*. The proposed Division 296[1] tax together with this exposure draft are adding further and unnecessary complexity to a system that is already significantly complex. Superannuation would benefit from simplification and the removal of red tape to improve member engagement, efficiency, and equity.

These measures will impose additional administration, reporting and regulatory burden on superannuation trustees across the sector. The costs incurred as a result will impact all superannuation fund members, not just those who are the target of this policy.

In response to these exposure draft regulations, our submission is limited to the operation of the regulations as proposed in the context of self managed superannuation funds (SMSFs).

Application to SMSFs

In their current form, the draft regulations appear to operate in a way that results in defined benefit pension interests in an SMSF, being unable to obtain a family law value. This would appear to be an unintended outcome of the regulations, with the family law split value intended to apply.

Tracing through the applicable regulations, you arrive at *Family Law (Superannuation)*[2] regulation 39. This is found in Division 5.2 which expressly does not apply to an interest in an SMSF. As a result, an SMSF defined benefit pension does not have a family law split value.

Examination of the diagram on page 6 of the accompanying explanatory statement suggests that if the pension does not have a family law split value, and it's not a 'certain innovative income stream' under

[1] Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023 (Cth).
[2] *Family Law (Superannuation) Regulations 2001* (Cth).

regulation 307-230A.08[3] its value for Division 296 purposes will be determined under s307-205[4], which leads to Schedule 1B[5].

If the intent is for an SMSF paying a complying lifetime or life expectancy pension to use the relevant Schedule in the *Family Law (Superannuation) Regulations 2001*, amendments to the draft regulations will be required to ensure they operate as intended.

Family Law Regulations and Valuation Factors

In anticipation of the sunsetting of the *Family Law (Superannuation) Regulations 2001,* consultation is currently underway with the Attorney General's Department. The timing of that consultation and when the regulations are to come into effect is of importance, given the commencement date for the proposed Division 296 tax and the role they will play.

It has however, been difficult to form an opinion on the suitability of the valuation method as the relevant valuation factors have not been published. The accompanying consultation paper[6] notes that 'it would not be appropriate to publish these methods or the factors so far in advance of their commencement as this may influence parties' behaviour in resolving disputes about family law property division.'[7]

When finalising the *Better Targeted Superannuation* regulations, they must be considered alongside the *Family Law* regulations. It is essential that the registration of both regulations is attended to concurrently.

We wish to also raise concerns regarding the intended application of valuations obtained through family law valuations for the purposes of the Better Targeted Superannuation Concessions measure. Due to the actuarial nature of these valuations, we believe that there may be a policy mismatch between the use of life expectancy in arriving at valuations for either family law settlements, as opposed to the proposed Division 296 tax on earnings in superannuation.

Specifically, we note that life expectancy for women is generally longer than for men. While this is not generally considered a problem in respect of family law settlements, it is likely to result in women being subject to an uplift in tax relative to men for the purposes of the proposed tax. We also anticipate a significant increase in valuation factors due to the continuous rise in life expectancy rates since 2001.

We recommend that life expectancy be prescribed at par for the purposes of valuations being undertaken for the purposes of Division 296.

[3] Treasury Laws Amendment Instrument 2024: Better Targeted Superannuation Concessions (Exposure Draft): Proposed amendments to *Income Tax Assessment (1997 Act) Regulations 2021* (Cth).

[4] *Income Tax Assessment Act 1997* (Cth).

[5] *Superannuation Industry (Supervision) Regulations 1994* (Cth).

[6] Attorney-General's Department, *Family Law (Superannuation) Regulations 2024* (Consultation Paper, March 2024).

[7] Ibid, 11.

Calculation of Family Law Values for SMSFs

As the draft regulations currently stand, it appears either the SMSF trustees will need to undertake the calculation and report the pension value to the ATO on an annual basis, or the SMSF trustees will need to report certain details about the pension to the ATO so the ATO can do the calculation.

Given the complexity of the formula proposed, and the existing obligation for SMSF trustees to obtain an annual solvency actuarial certificate, we believe there is merit in this certificate also including the pension's family law split value calculated in accordance with the prescribed Schedule. This approach would be consistent, robust and while it will incur additional cost to the fund, it would still be the most efficient and cost-effective approach.

Reporting can also be simplified, with Trustees including this pension value in the member's total superannuation balance reported via existing labels in the SMSF annual return.

Legacy Pensions Amnesty

Given the complexity arising on the operation of these measures, we strongly encourage the Government to urgently legislate the legacy pension amnesty. The amnesty provides an opportunity for the small number of individuals who have these pensions to wind up the arrangement and deal with the proceeds ahead of the proposed introduction of Division 296.

While the amnesty will be essential for those with larger balances, the focus of the policy design must always be on the number of ordinary Australian's who remain trapped in these arrangements. For many in this cohort, these products that are no longer fit for purpose.

There are many examples where the costs to administer the SMSF exceed the pension payments received by the member. This policy will only impose further costs to a group who are already disadvantaged. Any policy design which focuses on the very small number of individuals with larger balances in these products risks an overly complex model and poor outcomes for those most in need of a simple solution.

Expediency in the delivery of these relief measures and simplicity in its operation are essential. Further, members should not be penalised through the levying of punitive taxes when restructuring their affairs. As many impacted individuals as possible should be actively encouraged to participate in the amnesty.

If you have any questions about our submission, please do not hesitate to contact us, and we thank you again for the opportunity to provide this submission.

Yours sincerely,

Peter Burgess
Chief Executive Officer

ABOUT THE SMSF ASSOCIATION

The SMSF Association is the peak body representing the self-managed superannuation fund (SMSF) sector which is comprised of over 1.1 million SMSF members and a diverse range of financial professionals. The SMSF Association continues to build integrity through professional and education standards for practitioners who service the SMSF sector. The SMSF Association consists of professional members, principally accountants, auditors, lawyers, financial advisers, tax professionals and actuaries. Additionally, the SMSF Association represents SMSF trustee members and provides them with access to independent education materials to assist them in the running of their SMSF.